IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
NATIONAL GYPSUM COMPANY,	§	CASE NO. 390-37213-SAF-11
AANCOR HOLDINGS, INC.,	§	CASE NO. 390-37214-SAF-11
DEBTORS.	§	(Jointly Administered)

MEMORANDUM OPINION AND ORDER

The NGC Settlement Trust moves the court for approval of its final calculation of the Subsequent Asset Valuation (SAV), required by §5.1(l) of the First Amended and Restated Joint Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code for National Gypsum Company and Aancor Holdings, Inc. With the motion, the trust requests that the court authorize the trustees to make the final payment to the holders of allowed asbestos property damage claims. The trust has concluded that the final payment should be $30,619,961.

The Property Damage Trust Advisory Committee (PD TAC), National Gypsum Company (New NGC), and the Legal Representative for Future and Unknown Asbestos Disease Claimants object to portions of the trust's final SAV calculation. The PD TAC maintains that the final payment should be $51,014,127. The Legal Representative concludes that the trust has overstated the final payment by approximately $5,000,000. New NGC contends that

the court should instruct the trust to recalculate the final payment.

The court conducted an evidentiary hearing on the trust's motion on March 4, 5, 6, 7 and 15, 2002. As the supervisory court over the trust, this court has jurisdiction over the trust's calculation of the SAV. Confirmation order, ¶¶29(a) and 29(b); Plan, §§8.1 and 8.3. This memorandum opinion contains the court's findings of fact and conclusions of law. Bankruptcy Rules 7052 and 9014.

Overview

The NGC plan transferred certain assets to the trust for the benefit of the trust's beneficiaries. The beneficiaries include holders of asbestos bodily injury and property damage claims, as well as future and unknown asbestos disease claimants. The transfer consisted of three basic assets, referred to in the plan as "Valuation Assets," that included: (1) the Austin Company, valued by the court at confirmation to be worth approximately $125,000,000 as of the effective date of the plan; (2) insurance policies with a face amount of approximately $585,000,000 with insurance-related causes of action; and (3) $10,000,000 in cash.

With the assistance of Professor Francis McGovern, the official committee of asbestos claimants, through bodily injury and property damage subcommittees, negotiated a landmark compromise that allocated a portion of the Valuation Assets to

the property damage claimants, with the remainder reserved for asbestos disease claimants. The asbestos claimants agreed to an asset valuation formula for the division of the assets, the implementation of which forms the basis of the instant motion. The SAV calculation involves factors that significantly impact the amount of the final payment to property damage claimants. Not unexpectantly, the trustees' calculation has resulted in several contested points. The difficulty of implementing the SAV notwithstanding, the asbestos claimants' compromise played a crucial role in allowing the survival of an operating NGC business with a fair treatment of asbestos claims. Regardless of the outcome of this motion, the parties who negotiated the compromise, as well as the parties in interest who supported the compromise at confirmation of the NGC plan, made a significant and crucial contribution to the resolution of a difficult bankruptcy case.

The plan committed the Austin Company to the trust. After the transfer of the assets to the trust, the trustees concluded that, due to market conditions, the trust could not obtain the value of the Austin Company that had been anticipated at confirmation. The trust filed motions seeking several forms of relief from this court. In response, New NGC and the trust negotiated another settlement. Under that settlement, New NGC purchased the Austin Company under a financial arrangement that

made the trust whole as anticipated at confirmation. That compromise played a crucial role in allowing the operation of the trust as anticipated at confirmation, including the treatment of its asbestos disease and property damage beneficiaries. Regardless of the outcome of this motion, the parties who negotiated that settlement also made a significant and crucial contribution to the operation of the trust, with New NGC performing an act of good corporate citizenship and social responsibility.

The existence of the instant dispute over the SAV calculation should not diminish the importance of those agreements. The fact that the court must resolve the SAV dispute at this date should not diminish either the benefits to the operating company and its employees or the treatment of claims and the operation of the trust that resulted from those pragmatic agreements.

Confirmation of a plan may never have occurred without the asbestos compromise. Half a decade of asbestos claimants treatment may never have occurred without the Austin Company settlement. The dispute over the final SAV calculation should not cause the parties to lose sight of the importance of those prior agreements.

The plan allocated a base amount of $137,500,000 to the property damage claimants, calculated by an Initial Asset Valuation. Plan, §1.39. The plan directed that the allocation

would be adjusted based upon the SAV. Plan, §5.1(k). If the SAV exceeds $600,000,000, then the base amount would be increased by 20% of the excess not to exceed an increase of $25,000,000. However, if the SAV is less than $500,000,000, then the base amount would be reduced by 20% of the difference, not to exceed a reduction of $25,000,000. As adjusted, the base allocation could be as high as $162,500,000 or as low as $112,500,000. Plan, §5.1(k)(2).

The plan further provides that the property damage allocation would be increased by "an additional amount *equal* to the simple interest which accrues at the rate of 3% *per annum* on the undistributed amount of the Base Property Damage Allocation, as adjusted during such period." Plan, §5.1(k)(3). After payment of the property damage allocation, all remaining trust assets were allocated to the payment of asbestos disease claims then remaining unsatisfied. Plan, §5.1(k)(4).

The Plan provides that SAV "means the sum of: (a) the present value of the Valuation Assets as of the Subsequent Asset Valuation Date, as such present value shall be determined by the [Trustees] pursuant to the terms and conditions contained in *Section 5.1(l)* of this Plan, and (b) the value of the Retained Debtor Action Recoveries." Plan, §1.188. The Subsequent Asset Valuation Date means "December 31, 1995 or as soon as practical thereafter." Plan, §1.189.

Section 5.1(l) of the Plan provides:

> (l) *Determination of Subsequent Asset Valuation.* On the Subsequent Asset Valuation Date, the [Trustees] shall determine the Subsequent Asset Valuation. In determining the Subsequent Asset Valuation, the [Trustees] shall consider the present value of the Valuation Assets that existed as of December 31, 1992 and the value of the Retained Debtor Action Recoveries, *except* that the value of the payments made by any Insurance Company to the CCR from September 30 through December 31, 1992, shall be added to the present value of the Valuation Assets for the purpose of the Subsequent Asset Valuation; *provided, however,* that the Subsequent Asset Valuation shall exclude the Asbestos Insurance Debtor Action Recoveries against Liberty Mutual described in *Section 5.1(k)(1)* of this Plan. To make the Subsequent Asset Valuation comparable to the Initial Asset Valuation in terms of the time value of money, the Subsequent Asset Valuation will take into consideration reductions in the values of the Valuation Assets and the Retained Debtor Action Recoveries due to Cash expenditures or liabilities incurred by the [Trust] subsequent to September 30, 1992, and not otherwise reflected in the Initial Asset Valuation.

At confirmation, the court approved the execution of the NGC Settlement Trust Agreement. The trust agreement articulates guidelines for the trustees to follow in determining the SAV:

> It has been assumed that the present value of the Assets is between $525 million and $575 million as of December 31, 1992 (the "Initial Asset Valuation"). An evaluation of the Assets will be made by the Trustees as soon as practicable after December 31, 1995 (the "Subsequent Asset Valuation"), which shall be based on values of the Assets that existed as of December 31, 1992, except that the value of the payments made by NGC's insurers during the period from September 30, 1992 through December 31, 1992 to the Center for Claims Resolution shall be added to the value of the Assets for the purpose of the Subsequent Asset Valuation, and the value of the Asbestos Insurance Debtor Action Recoveries against Liberty Mutual shall be excluded. Such valuation shall be made using the same methodology employed in the Initial Asset Valuation, which is

> described on Annex C hereto. In order to make the Subsequent Asset Valuation comparable to the Initial Asset Valuation in terms of the time value of money, the Trustees will take into consideration reductions in asset values due to cash expenditures or liabilities incurred by the Trust subsequent to September 30, 1992, and not reflected in the Initial Asset Valuation.

NGC Asbestos Disease and Property Damage Settlement Trust, ¶2.05(a)(ii).

Annex C outlines the Initial Asset Valuation and directs that the "same methods of evaluation shall be used for the Subsequent Asset Evaluation [sic], but the latter Evaluation shall be drawn upon then current information and all assets shall be given a present value as of December 31, 1992." Annex C at 1.

In the event that any provision of the trust agreement conflicts with the plan, the plan governs. Trust Agreement, ¶7.11. In the event that any provision of the trust agreement conflicts with the court's confirmation order, the order governs. Id.

The court must determine the applicable legal standards, including the application of the provisions of the plan. The construction of the plan and the trust agreement present questions of law for the court. On the other hand, where the trust agreement leaves a matter to the discretion of the trustees, the court must uphold the trustees' actions absent an abuse of discretion. Beaty v. Bales, 677 S.W.2d 750, 754 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.).

Austin Company

The trustees determined that $85,000,000 should be the amount assigned for the sale of the Austin Company. However, New NGC contends that the amount should be $45,000,000.

Annex C provides: "If the Trust's interest in the Austin Company has been sold in full or in part, [then] the value of consideration actually received by the Trust, plus the value of any remaining debt or equity interest held by the Trust in the Austin Company" shall be used for the SAV. Annex C, ¶2.

Pursuant to a settlement with New NGC, the trust sold 100% of the stock of the Austin Company to New NGC, for $125,000,000 plus interest, for a total of $127,800,000 "actually received" by the trust. By an order entered May 1, 1995, this court approved the settlement, including the stipulation of settlement made April 7, 1995, between the trust and New NGC. The stipulation provides: "For the purposes of the Subsequent Asset Valuation as of December 31, 1995, no portion of the New NGC Funding Commitment in excess of $85,000,000 shall be included in the Valuation Assets." Stipulation of Settlement, ¶3. Consistent with that settlement, the trustees have included only $85,000,000 of the consideration actually received.

New NGC contends that the $125,000,000 plus interest paid for more than the Austin Company stock. New NGC argues that, as a result, the value of the consideration that the trust actually

received for Austin must be less than the total consideration paid. To determine the amount attributable to Austin, New NGC argues that the SAV should use the fair market value of the Austin Company at the time of the sale. As the fair market value was less than $85,000,000, New NGC argues that the trustees erred by using the stipulated SAV ceiling amount of $85,000,000.

The plan contemplated that the trust would sell the Austin Company for $125,000,000 by 1995. At confirmation, the court found that Austin would have a fair market value as of the effective date of the plan of $125,000,000. Findings of fact, ¶33.[1] In anticipation of a sale, Annex C directs that the "value of consideration actually received" by the trust upon the sale of Austin be used.

An actual sale of Austin did not necessarily require or even contemplate a fair market sale between a willing buyer and a willing seller. Indeed, the sale that actually occurred constituted a private sale to New NGC as part of a settlement. While the trust may have been a willing seller for $125,000,000, plus interest, New NGC was not a willing buyer. Rather, New NGC was a captive buyer.

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[1] See March 9, 1993, Findings of Fact and Conclusions of Law on Confirmation of the First Amended and Restated Joint Plan of Reorganization of National Gypsum Company and Aancor Holdings, Inc. ("Findings of fact"). The effective date of the plan was July 1, 1993.

The trust had filed motions with the court seeking to terminate the processing of asbestos disease claims through the Center for Claims Resolution (CCR). The trust also requested court authority to decline to join in the settlement of Robert A. Georgine, et al. v. Amchem Products, Inc., et al., and to vacate the plan's channeling order, thereby allowing certain asbestos disease claimants to commence litigation against New NGC. The trust had obtained an appraisal of Austin from Coopers & Lybrand. Coopers determined that Austin had a fair market value of $45,000,000, as of October 21, 1994. With that value, the trustees concluded that the trust could not realize the $125,000,000 from Austin contemplated at confirmation. Without that value, the trustees further concluded that the trust could neither process claims through the CCR nor participate in Georgine. Consequently, the trustees determined that the claimants should have relief from the injunction.

At the suggestion of the court, New NGC and the trust negotiated the settlement. New NGC agreed to pay $125,000,000 to the trust labeled as New NGC Funding Commitment. Stipulation, §B, ¶1(a). In return, the trust transferred 100% of the Austin stock to New NGC. New NGC retained the discretion to allocate the sales price for the Austin stock, with the allocation for the sales price not to exceed $112,500,000. Stipulation, §B, ¶1(c)(1)(A). The Austin sale would close by June 30, 1995.

Stipulation, §B, ¶1(c)(1)(C). Whatever amount of the funding commitment not attributable to Austin by New NGC could be used by New NGC as a qualified settlement fund (QSF) contribution for tax purposes. The trust and New NGC agreed that New NGC could allocate for New NGC's accounting the funding commitment between Austin and the QSF in its discretion, subject to the ceiling of $112,500,000 for Austin. Stipulation, §B, ¶1(c)(1)(e). For its part, the trust agreed: (1) that it would remain a member of the CCR; (2) that it would request court approval to participate in Georgine; and (3) that it would not request relief from the channeling order before June 30, 2004. The trust committed to implementing an alternative asbestos disease claims facility if it concluded that the trust's assets did not permit continued membership in CCR. Stipulation, §B, ¶4(b). And, as previously explained, with regard to the SAV, the trust agreed not to assign more than $85,000,000 of the funding commitment for Austin.

Knowing that Coopers & Lybrand had valued Austin in the market at $45,000,000, New NGC paid $127,800,000 including interest, and negotiated an agreement whereby it could allocate up to $112,500,000 for the stock of Austin Company. The trust sold Austin to New NGC, for which it received $127,800,000, but negotiated an agreement not to use more than $85,000,000 for SAV purposes. With that consideration, the trust could: (1) continue to process asbestos disease claims in the CCR; (2)

participate in Georgine; and (3) commit to refrain from seeking channeling order relief until 2004.

In other words, with the funding commitment, the trust could perform as contemplated at confirmation. Alan Kahn, one of the trustees, testified at the SAV hearing that New NGC effectively made the trust whole for Austin as contemplated by the plan.

The trust and New NGC deferred to each other the manner of accounting for the sale on their respective books and records, provided that the trust would apply no more than $85,000,000 to the SAV. New NGC could allocate the funding of the settlement between the Austin sales price and a QSF contribution at its discretion for its internal valuation and taxation purposes, with the proviso that New NGC would not allocate more than $112,500,000 to the Austin sales price, which not coincidentally was the minimum payment amount to the property damage claimants. Stipulation of Settlement, §B, ¶1(c)(1)(e). For its part, the trust agreed to the limitation that the SAV would not exceed $85,000,000; but, otherwise, the agreement did not dictate how the trust would account for the sale.

As found above, at confirmation the court found that Austin would have a fair market value of $125,000,000, on the plan's effective date in 1993. The court analyzed plan feasibility with a finding that the trust would sell Austin for $125,000,000 by 1995. The trust sold Austin to New NGC, albeit not by a market

transaction. The trust obtained $125,000,000 plus interest from New NGC in 1995. The trust could, therefore, reasonably conclude that the value of the consideration actually received by the trust for the sale of Austin was $125,000,000.

New NGC did not present evidence of how it actually allocated the funding commitment on its books. New NGC had issued a press release after it acquired Austin suggesting an initial value for the Austin stock, on a fair market value analysis, of $70,000,000, subject to an appraisal. But, as the court found above, the sale did not involve a fair market transaction between a willing buyer and a willing seller. Rather, the sale reflected an implementation of a Chapter 11 plan of reorganization with a package of benefits. New NGC, a creation of the plan, was also its captive. New NGC presented no evidence of how it valued those benefits. New NGC presented no evidence of the amount, if any, of the QSF it entered on its books. New NGC decided to pay the funding commitment for the settlement package, including the Austin stock. New NGC had discretion to value its components as met its needs; so too, the trust.

Martin Dies testified that the PD TAC responded to the $85,000,000 unfavorably. As the plan contemplated that the actual consideration received by the trust for Austin would be used in the SAV and since the IAV set the value at $125,000,000,

the PD TAC reacted unfavorably to the limitation. The lower the amount used in the SAV, the less likely the final payment to the property damage claimants would increase.

But, W.D. Hilton, Jr., at the time a trustee and now the trust's executive director, convinced Dies not to object to the settlement. The settlement allowed the trust to realize a value for Austin that it could not realize in the market. Based on the Coopers & Lybrand appraisal, the trust faced the prospect of obtaining only $45,000,000 for the Austin stock in the market, and then only after implementation of a business plan. At the SAV hearing, the PD TAC challenged Robert Robison who supervised the appraisal for Coopers. Robison reported short term liquid assets of $34,838,000. The PD TAC suggested that Austin would not have transferred those assets with the Austin stock for only $45,000,000. But, Robison maintained that the liquid assets would be necessary to ensure the operating funding necessary to perform contractual obligations and projects.

For analytical purposes, the trust could have assumed that it could realize the $45,000,000 from a sale, and retain the cash or cash equivalent assets of $34,838,000. But, that would total approximately $80,000,000, an amount substantially below the plan's anticipation of $125,000,000. Indeed, New NGC made a preliminary allocation for its books of $70,000,000 for the

Austin stock. The trust adopted that value for its books. The trust had to use a fair value for its books.

Thus, if the trust had to sell Austin on the open market, it would have likely received less than the $85,000,000, thereby diminishing the return to the property damage claimants. The settlement with New NGC helped maintain value for Austin, which would aid the property damage claimants in the SAV, when compared with a market transaction. New NGC, for its part, recognized the countervailing need to steer a portion of the consideration in a manner that would aid the payment of asbestos disease claimants, thereby minimizing its long term potential exposure. As the settlement allowed asbestos disease claims to continue to be processed in the tort system, the Legal Representative and the Bodily Injury Trust Advisory Committee (BI TAC) had reasons not to oppose the settlement. In the end, the PD TAC chose not to object to the settlement.

At the hearing on the settlement, the Legal Representative observed that the settlement did not require that the court actually value Austin. The court did not make a finding of the fair market value of Austin at that hearing, nor does the court do so now. The court reiterates that the sale of Austin under the settlement was not a fair market sale. New NGC could have and indeed did agree to pay the trust more than the Coopers' appraisal reflected for the fair market value in 1995. Pursuant

to Annex C, the trust could have and indeed did value the consideration it actually received for the Austin stock at above $85,000,000.

The court granted the trust's motion to approve the settlement, including the $85,000,000 Austin SAV ceiling amount.

The court has found above that the trust could reasonably conclude that the value of the consideration it actually received for Austin was $125,000,000. The court further finds that the value of the consideration actually received exceeded $85,000,000. Using the consideration actually received for a sale of Austin pursuant to Annex C is consistent with the plan as confirmed by this court, which contemplated and anticipated an actual sale of Austin by 1995. Consequently, the trustees neither abused their discretion nor violated any plan provision by using the $85,000,000 ceiling of the settlement for the SAV for Austin.

The court addresses three other points concerning Austin. First, Hilton testified that the trust's auditors directed that trust assets be booked at fair value. Paul R. Dassel, the auditor, confirmed that requirement. At the SAV hearing, the parties reviewed the book value for Austin stated on the trust's books at different times. Thus, the trust's balance sheet reported a fair value for Austin of $45,000,000 on December 31,

1994. But, again, for the SAV calculation, the trust must use consideration received, not fair value.

Second, the Legal Representative contends that had the stipulation of settlement intended that $85,000,000 be used, as opposed to being a ceiling, the stipulation would have so recited. While the Legal Representative has been consistent in his position, the court has found above that the trustees did not misapply the stipulation.

Lastly, New NGC contends that the trustees could not attribute $125,000,000 to consideration actually received for Austin because a portion of the income should have been attributed by the trust to a QSF. The stipulation of settlement vests discretion in the trust for its allocation of the proceeds, just as the stipulation vests discretion in New NGC for its accounting of the payment. The court has found that the trustees did not abuse their discretion.

"As of" Date

The plan directs that: "On the Subsequent Asset Valuation Date, the [Trustees] shall determine the Subsequent Asset Valuation. In determining the Subsequent Asset Valuation, the [Trustees] shall consider the present value of the Valuation Assets that existed as of December 31, 1992. . . ." Plan, §5.1(l). The Subsequent Asset Valuation Date means "December 31, 1995 or as soon as practical thereafter." Plan, §1.189. The

trust agreement directs that "[a]n evaluation of the Assets will be made by the Trustees as soon as practical after December 31, 1995 (the "Subsequent Asset Valuation"), which shall be based on values of the Assets that existed as of December 31, 1992." Trust Agreement, ¶2.05(a)(ii). Annex C then instructs that "all assets shall be given a present value as of December 31, 1992." Annex C at 1.

The trustees adopted the directive of Annex C, and determined a present value for the Valuation Assets as of December 31, 1992.

The PD TAC contends that Annex C conflicts with the plan. In the event that a provision of the trust agreement conflicts with the plan, the plan governs. Trust Agreement, ¶7.11. The PD TAC argues that the plan directs that the present value should be determined as of the Subsequent Asset Valuation Date, December 31, 1995. The trust responds that the trust agreement with Annex C is consistent with the plan when read as a whole, making the Annex C directive appropriate. New NGC and the Legal Representative support the trust's reading of the documents on this issue.

The court begins its analysis with the language of the plan. The plan mandates that the trustees "shall consider the present value of the Valuation Assets that existed as of December 31, 1992." The plan does not say that the trustees "shall consider

the present value of the Valuation Assets *as of* December 31, 1992." The court cannot read the words "that existed" out of the plan. National Gypsum Co. v. Prostok, 2000 U.S. Dist. LEXIS 16174, 47-49 (N.D. Tex. 2000). The plan, therefore, directs the trustees to determine the present value of specific assets, namely, the Valuation Assets, as they existed at a particular time, namely, December 31, 1992.

For example, on December 31, 1992, $10,000,000 existed in cash. Regardless of interest earned or expenditures, the trustees had to consider the $10,000,000. On December 31, 1992, the Austin Company had been owned by National Gypsum Company with the stock to be effectively transferred to the trust in the plan. The plan contemplated that the trust would sell Austin, as found above, prior to the SAV date. The plan further contemplated that the trust would invest the proceeds of the Austin sale. The plan did not include the return on that investment in the Valuation Assets. Thus, to determine the SAV, the plan had to direct the trustees to consider Austin as of December 31, 1992, to accomplish the bargain not to include the investment return in the SAV.

When must the trustees determine the present value of the Valuation Assets as they existed as of December 31, 1992? The plan answers that the trustees must make that determination on the Subsequent Asset Valuation Date, namely, December 31, 1995,

or as soon as practical thereafter. On that date, the trustees "shall determine the Subsequent Asset Valuation." Plan, §5.1(l). Thus, on December 31, 1995, or as soon as practical thereafter, the plan mandated that the trustees determine the SAV by considering the present value of a bundle of specified assets as they existed at a point in time. From these provisions, the court concludes that the plan directs that the SAV present value be determined as of the Subsequent Asset Valuation Date.

The trustees did not make the SAV determination on December 31, 1995. Because of significant insurance recovery uncertainties, the trustees determined that it would not be practical to make the determination on December 31, 1995. The BI TAC, the PD TAC, and the Legal Representative agreed that the trustees could delay the determination until the insurance recoveries become more certain.

The PD TAC does not contend that the present value "as of" date should be extended to the date of the actual calculation after December 31, 1995. The PD TAC concedes that the plan directs that December 31, 1995, be the SAV date, with the trustees given latitude in the plan because the uncertainties made a calculation impractical.

The court must read the plan to harmonize its provisions, giving meaning to all its provisions. National Gypsum Co. v. Prostok, 2000 U.S. Dist. LEXIS at 48. Section 5.1(l) cannot mean

that the present value would be as of the date the trustees actually make the SAV, if after December 31, 1995. The plan allowed the trustees to consider the practicalities of making the SAV calculation. The practicalities have resulted in the SAV calculation remaining incomplete to this day. If the court used the date of this decision to be the SAV date, then the court would read the present value requirement of §5.1(l) out of the plan. This the court may not do.

The plan fixes the date at December 31, 1995. The plan provides the trustees with discretion in making the actual calculations after that date. But, when the trustees make the calculations, they must "consider the present value [as of the Subsequent Asset Valuation Date of December 31, 1995] of the Valuation Assets that existed as of December 31, 1992." Plan, §§1.189 and 5.1(l).

The trust argues that other provisions of the plan must be harmonized, which support a December 31, 1992, "as of" date. The plan recognizes that the Valuation Assets will change from December 31, 1992, to the SAV date. But, the plan addresses that anticipated change by directing that the SAV consider reductions in values due to cash expenditures and liabilities incurred by the trust not reflected in the IAV. Plan, §5.1(l).

The plan provides that interest would be paid to the property damage claimants in addition to the base allocation

resulting from the SAV. The interest would be assessed from January 1, 1993. Plan, §5.1(k)(3). The trust contends that the present value of the Valuation Assets must be December 31, 1992, to be consistent with the plan's provision that interest runs from January 1, 1993, not January 1, 1996. The court recognizes the logic in this reading of the plan. But, the logic fails to include a reading of the plan as a whole.

The plan delayed payment of allowed property damage claims. The plan neither provided for a distribution to property damage claimants on the effective date of the plan in 1993 nor even on the date of the allowance of a claim. In addition, the plan did not direct the amount of the payment to property damage claimants. Rather, as outlined above, the plan adopted a range of potential recoveries depending on the SAV. Accordingly, the plan delayed payment of property damage claimants while merely fixing the parameters of the ultimate total amount to be paid to allowed property damage claimants.

On the other hand, the plan allowed the continued processing and payment of asbestos disease claims in the tort system and protected future and unknown asbestos disease claims by excluding them from any permanent injunction or discharge.

To compensate the property damage claimants for the delay and uncertainty as well as the disparate treatment, the plan provided that 3% interest would be assessed from January 1, 1993.

The court takes judicial notice that the United States Treasury rate used for federal court post-judgment interest on December 31, 1992, was 3.72%, and on the effective date was 3.54%. Thus, the 3% approximated the basic risk free rate of return at confirmation. In the IAV and at confirmation, Mark A. Peterson used a 3% rate of return plus a 4% inflation factor. The interest rate applied by the plan addresses the rate of return but not the projected inflation factor. But, the plan provided further compensation to the property damage claimants. The plan adopted the SAV date of December 31, 1995. By using that date for the SAV "as of" present value determination, the property damage claimants had the potential to realize that inflation factor. Dies testified that when the property damage claimants agreed to the delay in payment, they obtained assurance that the payment when made would have the value of a cash payment at confirmation. The interest payment plus the December 31, 1995, "as of" date addressed the concern that the property damage claimants would not be penalized for the delay.

The plan recognized the difficulties in determining the property damage allocation at confirmation. The plan set a range of recoveries and then delayed the allocation calculation to December 31, 1995, or as soon as practical thereafter. The plan compensated the property damage claimants by adopting a December 31, 1995, as of present value date, and a 3% interest rate from

January 1, 1993. At the same time, the plan allowed the continued payment in full of asbestos disease claimants holding bankruptcy claims while protecting future and unknown asbestos disease claimants. See In re National Gypsum Co., 257 B.R. 184, 188, 204-05 (Bankr. N.D. Tex. 2000).

The trustees followed the directive of Annex C. Hilton and Kahn both testified that a determination that the plan nullifies Annex C regarding the present value "as of" date should be made by the trust's supervising court, not by the trustees. The court agrees with that position.

The court concludes that the provision of Annex C directing the trustees to use a present value date of December 31, 1992, conflicts with the plan. As the plan controls, December 31, 1995, must be used for the "as of" present value date.

The court does not hold, however, that Annex C should not be followed by the trustees for directives that do not conflict with the plan. Annex C had been presented at confirmation with the trust documents. At confirmation, the court made a finding of fact that the disclosure statement provided adequate information. Findings of fact, ¶7. The court also found that the plan documents disclosed material facts concerning the trust documents. Findings of fact, ¶42. No property damage claimant contended in post-confirmation motions or by appeal that those findings were erroneous. In the confirmation order, the court

approved the plan documents, including the trust documents and its annexes. Confirmation order, ¶4. No property damage claimant sought relief from that order. That order has long since become final and binding. Accordingly, unless a provision conflicts with the plan, the trustees should follow Annex C.

At confirmation, Dies, on behalf of the property damage claimants on the asbestos creditors committee, testified in support of the plan. Dies actually testified that Annex C implemented the asbestos claimants agreement. Dies even testified that Annex C set the "as of" date at December 31, 1992. Prior to his testimony, Dies consulted with the committee's attorney concerning Annex C. Dies had not studied the document, but, after consultation with counsel, testified that the document implemented the agreement. Annex C had actually been drafted by Peterson for use by McGovern in asbestos' creditors negotiations. But, McGovern did not actually use the document in those negotiations. Nevertheless, Annex C emerged as a plan document. Dies testified in the SAV hearing that he erred in his confirmation testimony. Even if Dies erred in his confirmation testimony, the court approved the trust documents, including annexes. The trust document and the annex are therefore binding, but, if a provision conflicts with the plan, the plan governs.

Interest Rate

The plan provides:

> "(3) Beginning on January 1, 1993, and continuing until such date as all Allowed Asbestos Property Damage Claims are satisfied pursuant to the terms and conditions of this Plan and the NGC Asbestos Settlement Fund Documents, an additional amount *equal* to the simple interest which accrues at the rate of 3% *per annum* on the undistributed amount of the Base Property Damage Allocation, as adjusted during such period, shall be allocated to, and made a part of, the Asbestos Property Damage Sharing Allocation."

Plan, §5.1(k)(3).

The "Base Property Damage Allocation" means the sum of $137,500,000, as adjusted by the SAV process pursuant to §5.1(k)(2). Plan, §1.39. The "Asbestos Property Damage Sharing Allocation" means the portion of the trust's assets allocated to resolving and satisfying asbestos property damage claims determined under §5.1(k) of the plan. Plan, §1.29. The allocation includes the Base Property Damage Allocation as adjusted pursuant to the SAV process of §5.1(k)(2) and the interest payment of §5.1(k)(3).

Pursuant to these provisions, the trustees assessed 3% simple interest on the unpaid base amount, as adjusted by the SAV. The PD TAC contends that the trustees should have compounded the 3% interest annually until actually paid. New NGC and the Legal Representative agree with the trustees that the plan provides for simple interest.

Kahn testified that normal and customary business practice would have compounded the interest annually if not actually paid. Hilton agreed with that assumption. Accordingly, the trustees compounded the interest annually when they made their initial SAV calculation. In addition, the trustees compounded the interest annually when they made partial payments to the property damage claimants of the minimum base amount provided by the plan. However, when confronted with the plan's language of "simple interest," the trustees concluded that they should not compound interest.

The plan provides for "an additional amount *equal* to the simple interest . . ." for the property damage allocation. Plan, §5.1(k)(3). Webster's Dictionary defines simple interest as "interest paid or computed on the original principal only of a loan." Webster's Third New Int'l Dictionary 2121 (1986). Black's Law Dictionary defines simple interest as interest that is "paid on the principal only and not on the accumulated interest." Black's Law Dictionary 817 (7th ed. 1999). This contrasts with compound interest which has been defined as either "interest on interest" or interest that is "paid on both the principal and the previously accumulated interest." Id. "When money is invested at compound interest, each interest payment is reinvested to earn more interest in subsequent periods. In contrast, the oppor-tunity to earn interest on interest is not provided by an

investment that pays only simple interest." R. Brealey and S. Myers, Principles of Corporate Finance 43 (Irwin McGraw-Hill, 6th ed.) See, also, Tex. Farmers Ins. Co. v. Cameron, 24 S.W.3d 386, 400 n.5 (Tex. App.--Dallas 2000, pet. denied).

However, the plan further states that the additional amount equal to the simple interest "accrues at the rate of 3% *per annum*." All the words of the sentence must be given meaning. National Gypsum Co. v. Prostok, 2000 U.S. Dist. LEXIS at 47-49. W. Clifford Atherton, a Chartered Financial Analyst with a Ph.D. in Finance, testified that the word "accrues" means earned or due and payable and the words "per annum" means each year. Consequently, Atherton testified that the simple interest is payable at the end of each year. As a result, Atherton testified that since the interest becomes due and payable before the principal is due, the interest cannot by definition be purely simple. Rather, the interest will be simple prior to the time it comes due, but not afterward. Atherton testified that at the end of the year, the interest should be paid. If not paid in cash, then the interest would be deemed paid by an advance of principal. Under that approach to payment, the interest would be added to principal, and, hence, compounded. Atherton testified that the provision of §5.1(k)(3) therefore means that the trustees must assess simple interest until the accrual date, which means simple interest until the end of the year. At year's

end, the interest payment would be due and payable. As the interest payment is due and payable, the trustees could either pay in cash or pay by adding to the base amount, thereby compounding the interest.

But, the plan further provides that the additional amount "shall be allocated to, and made a part of, the Asbestos Property Damage Sharing Allocation." Plan, §5.1(k)(3). Under this provision, the plan directs that if the trustees do not pay the interest at year's end, then the interest is to be added to the total allocation due to the property damage claimants. The plan does not provide for the interest to be added to the base amount, which would be the compounding method of payment based on Atherton's testimony. Had the plan directed that the interest be included in the base amount, as adjusted, then compounding would be appropriate. But, instead, the plan directs that the amount be added to the total allocation. Applying Atherton's definition of "accrues" to the plan, the plan provides for an alternative to an annual cash payment by directing payment by adding to the total allocation. That method is binding on the parties.

Black's Law Dictionary defines "accrue" as "to accumulate periodically." Black's Law Dictionary 21 (7th ed. 1999). Accumulate means "the increase of a thing by repeated additions to it; esp., the increase of a fund by the repeated addition of the income it creates." Id. at 22. Using these definitions, the

simple interest of plan §5.1(k)(3) accumulates annually by adding the amount to the total allocation, not to the base payment due the property damage claimants. As interest is calculated on the unpaid base amount only, the additional amount added to the total allocation is not compounded.

The PD TAC asserts that the property damage claimants would not have agreed to a delayed payment that did not pay compound interest. The property damage claimants did indeed agree to the plan. The plan struck a certain balance. In exchange for the delay in payments the property damage claimants obtained several concessions, including the December 31, 1995, "as of" date as discussed above and the 3% additional amount added to their total allocation. But they did not receive a compounded interest by adding the 3% per year to the base payment.

The court, therefore, concludes that the trustees correctly read the plan. Simple interest accrues annually. On the accrual date, the trustees could have paid the interest in cash or by adding the amount to the total allocation dedicated to property damage claimants.

Discount Rate

To determine the "present value" required by §5.1(l) of the plan, the trustees must apply a discount rate to their valuation of assets. The trustees applied a discount rate of 8.5% to the insurance assets and 4.43% to Austin. The PD TAC contends that

the trustees should have applied the 4.43% return to the insurance assets as well as Austin. New NGC and the Legal Representative agree with the trustees' use of 8.5% for the insurance assets but contend that the trustees should have used a 7% rate for Austin.

The plan does not specify the discount rate that the trustees should use when determining present value. Annex C does not specify the discount rate that the trustees should use for Austin. Annex C does specify a discount rate of 8.5% for insurance settlements and payments. Annex C reports that an 8.5% rate had been used for insurance settlements and payments for the IAV.

Annex C does not conflict with the plan regarding the discount rate for present value determinations. Accordingly, the trustees properly applied the 8.5% rate for the insurance payments and settlements. The plan and trust documents left the discount rate for Austin to the sound discretion of the trustees, provided that they employed the same valuation methodology for Austin in the SAV as used in the IAV. Since Austin had been sold by December 31, 1995, the valuation methodology requirement for Austin was moot. For reasons discussed below, if a discount rate has to be used for Austin, then the trustees would not abuse their discretion in using the 4.43% rate. However, because the trustees had the $85,000,000 on December 31, 1995, from the sale

of Austin, the trustees had no need to apply a discount rate to arrive at the present value of the Austin sale for the SAV as of December 31, 1995.

The determination of insurance payments and settlements after December 31, 1995, had been fraught with uncertainties and risks. The unsettled nature of the insurance issues prompted the trustees to delay determining the SAV. The PD TAC, the BI TAC, the Legal Representative, and New NGC all recognized the risks associated with the unresolved insurance issues. Consequently, they did not oppose the delay. As Hilton testified, even after he began making insurance settlement and payment projections in 2000, the timing of actual payments has deviated from the projections. Hilton described, for example, that he projected receiving $5,000,000 from Transit Casualty in 2000, but that the trust received only $550,000. For 2001, he projected receiving $13,700,000 from Transit but the trust received only $500,000. On November 30, 2001, he projected receiving $13,900,000 from Transit in 2002, but, to date, Transit has made no payment. For other insurance, Hilton testified that the timing of his projected recoveries has not been met because the trust is not currently settling asbestos disease claims, making insurance negotiations futile.

Hilton testified that he made his best assumptions in projecting the insurance settlements and payments for the SAV.

He attempted to anticipate contingencies and build them into the assumptions. But, as the above examples demonstrate, the trustees cannot eliminate all uncertainties and account for all risks. Accordingly, a discount rate without a risk factor would be inappropriate. The PD TAC, consisting of lawyers schooled in the risks of litigating with insurance companies, understand the need to account for risks in valuation assumptions and discount rates.

In determining the IAV, Peterson testified that he added a 1.5% risk premium to the 7% rate he used to determine the rate. Annex C adopted the total 8.5% rate for insurance payments and settlements. Because that rate does not conflict with the plan, it governs.

The trust has realized a historic rate of return of 4.43%. Atherton testified that the historic rate should be used to discount to determine a present value at an earlier date. The 8.5% rate adds a considerable risk premium to that historic rate. But, even if Annex C did not govern, the court would not conclude that the trustees would abuse their discretion by invoking that premium given the history of uncertainty of the insurance issues in this case.

With regard to Austin, the trustees have no need to apply a discount rate to determine the present value as of December 31, 1995. As contemplated by the plan and confirmation hearings, the

trust had sold Austin by December 31, 1995, albeit by a settlement with New NGC rather than by an anticipated market transaction. The $85,000,000 for the SAV is the amount to be used on December 31, 1995. The discount exercise, therefore, has no application to Austin.

Under the plan, the property damage claimants do not participate in the earnings on the trust's investment of the Austin proceeds. The $85,000,000 goes into the SAV; earnings on the $85,000,000 go to asbestos disease payments.

For purposes of completeness, should an appellate court disagree with this court's reading of the plan, the court would find that the trustees would not abuse their discretion in using the trust's historic rate of return of 4.43% for Austin.

Hilton testified that the trust realized a 4.43% rate of return, pre-tax, from its investments from 1993 through 2001. The trust used a mixed investment strategy, attempting to minimize or eliminate tax obligations. The court understands from the testimony that the trust basically succeeded in minimizing tax obligations. New NGC contends that a post-tax historic rate of return should be used. Atherton agreed that if a taxable entity, the after tax rate should be used, as consideration of compounding of assets depends on the assets the trust may retain. Contrary to New NGC's calculations, however,

the success of the trust's tax strategy neutralizes its pre- and post-tax rate of return.

Atherton testified that a discount rate should be chosen at the time of the analysis. If determining value in 2002 as of 1995 or 1992, Atherton testified that the appraiser would know facts, such as the actual operating costs and actual costs of funds. Atherton also testified that since the SAV requires that the trust's assets be valued, the discount rate should employ the known cost of funds of the trust. Accordingly, he opined that the trust should use its known historic rate of return in determining in 2002 the present value of its assets as of 1992 or 1995.

While Atherton's opinion has no application to the insurance assets because of the trust's obligation to apply the rate specified in Annex C, his opinion informs a rate for Austin, as the plan and trust documents leave the rate to the discretion of the trustees, should they have a need to employ a discount rate for Austin.

Expenses

The trust agreement provides in §2.05(c):

> Expenses of the Trust shall be charged to the extent reasonably practicable to the fund to which they are directly attributable, as determined by the Trustees, whose determination shall be binding. Those expenses which are not directly or clearly attributable to any fund shall be allocated 75% to the Asbestos Disease Claims Fund and 25% to the Asbestos Property Damage Claims Fund, until completion of the Subsequent

> Asset Valuation, at which time, and for all periods thereafter, such allocation shall be retroactively adjusted such that such expenses are shared pro rata in accordance with the ratio between the Base Property Damage Allocation, as adjusted, and the total value of the Trust Assets as determined by the Subsequent Asset Valuation; provided, however, that the Trustees shall have the right to allocate certain expenses on such other equitable basis as may be established by the Trustees in their discretion from time to time after consultation with the TAC's (as hereinafter defined); and provided further that after satisfaction of Asbestos Property Damage Claims pursuant to the Plan, all expenses of the Trust shall be charged to the Asbestos Disease Claims Fund.

The plan provides that costs and expenses of the trust attributable to property damage claims be determined on a cash basis. Plan, §1.19. Similarly, costs and expenses of the trust attributable to asbestos disease claims must be determined on a cash basis. Id.

New NGC contends that the trustees abused their discretion in allocating expenses under these provisions. The Legal Representative agrees, in part, with New NGC.

The trust agreement directs that the trustees determine the allocation of expenses. The trustees delegated that determination to Hilton, the trust's executive director. New NGC contends that the trustees cannot delegate the expense allocation function. New NGC requests that the court set aside the allocation and direct the trustees to perform the function.

The trust agreement empowers the trustees to take actions to implement the purposes of the trust, provided the actions are not

inconsistent with the trust or applicable law. Trust Agreement, ¶3.01(a). The trustees may hire staff, including accounting staff, and may delegate tasks to that staff. Trust Agreement, ¶¶3.01(a)(ix) and (xiv).

Hilton testified that he assessed whether a particular expense pertained to disease or property damage. If it did, then he allocated that expense to the disease or property damage fund. If it did not, then he considered the expense to be a general expense to be shared pro rata by the beneficiaries as directed by §2.05(c) of the trust agreement. Kahn confirmed that the trustees delegated the task to either Hilton or his accounting staff. Kahn did not recall the trustees making a specific allocation decision except for the expenses that the PD TAC incurred in the instant litigation.

Nevertheless, Kahn further testified that the trustees reviewed the allocation of expenses made by Hilton. After their review, they consulted with both the BI TAC and the PD TAC concerning the allocations. Kahn testified that after the review and consultation, the trustees approved Hilton's allocations.

As the trustees reviewed the allocation of expenses and, after consultation with the TACs, approved the allocation, the court concludes that the trustees did not abrogate their duty to determine the allocation by delegating the work to Hilton and the accounting staff.

New NGC next contends that the trustees abused their discretion by allocating a disproportionate amount of the expenses to the asbestos disease fund. The Legal Representative supports this argument.

The trust responds that under the trust agreement, the trustees allocation of expenses is final, and, hence, not reviewable. Paragraph 2.05(c) of the trust agreement states that the trustees' "determination shall be binding." The provision does not state that the determination shall not be reviewable by the court. As the plan and trust documents contemplate judicial review of the SAV by the trust's supervisory court, the court concludes that the determination may be reviewed on an abuse of discretion when brought before the court as part of the SAV process, especially in conjunction with the trust's motion for an order of the court directing payment to the property damage claimants.

The trust agreement directs that those expenses not directly attributable to either the asbestos disease fund or the property damage fund be allocated 75% to the asbestos disease fund and 25% to the property damage claims fund until completion of the SAV, unless the trustees allocate certain expenses on an equitable basis established in the trustees' discretion. Trust Agreement, ¶2.05(c).

Hilton testified that based on the ratio established in ¶2.05(c), the actual property damage share of expenses was 26.9%. The trust allocated 26.9% of the general expenses to the property damage claims fund from 1993 through 1995. However, after 1995, the trustees lowered the allocation of general expenses to the property damage claims fund to approximately 5%.

New NGC argues that the trust agreement mandates an allocation of 25% of general expenses to the property damage claims fund until the completion of the SAV. As the SAV process has not yet been completed, New NGC contends that the 26.9% share should still be used. By reducing the allocation to approximately 5%, New NGC maintains that the asbestos disease fund is shouldering a disproportionate share of the general expenses.

Hilton testified that the property damage claims facility completed its work in 1995. He also testified that the trust paid the plan's minimum payment amount to the property damage claimants. As a result, the trust performed minimum property damage work after 1995. After 1995, the PD TAC basically monitored the trust until the trustees could determine the SAV with more certainty regarding the insurance assets. As a result, Hilton recommended that the trustees reduce the allocation of general expenses to the property damage claims fund to approximately 5%, which represents that approximate amount of directly-attributable property damage expenses of the trust since

1995. Kahn testified that after consultation with the Trust Advisory Committees (TACs), the trustees adopted that allocation.

In effect, the trustees concluded that after the completion of the work of the property damage claims facility and the determination that the trust had sufficient resources to make the minimum payment to the property damage claimants, equity favored readjusting the allocation after 1995 to reflect more accurately directly-attributable expenses. Neither TAC opposed that decision.

The trust agreement authorizes the trustees to re-allocate "certain expenses" on an "equitable basis" "in their discretion." After 1995, the trustees broadly applied the "certain expenses" provision to directly-attributable expenses. The trustees adopted Hilton's analysis. The trustees consulted with the TACs. The trustees approved the allocation. The Hilton analysis articulated reasons for the exercise of discretion. The reasons rationally explain the analysis. The analysis is consistent with equitable principles. Accordingly, the trustees did not abuse their discretion by adopting the allocation.

New NGC, joined by the Legal Representative, observe, however, that the delay in the SAV calculation should have benefitted both property damage and asbestos disease claimants by resulting in greater certainty of the value of the insurance assets. As the insurance assets constitute part of the SAV, they

argue that the property damage claimants should continue to share general expenses at the 26.9% level until the completion of the SAV process. While that observation may factor in favor of the 26.9%, it does not lead the court to find an abuse of discretion. If the trustees' decision is supported by a rational articulation of reasons consistent with applicable legal criteria, then a reviewing court should not find an abuse of discretion, even if the court may have exercised its discretion in a different manner.

But, the trustees have decided to allocate the PD TAC's expenses for the SAV litigation as a general expense. That decision does constitute an abuse of discretion. Once the trustees made the SAV determination and submitted the determination to the court for authorization to pay, attacks on the determination became a matter of litigation. The PD TAC assumed the role of an advocate in court for property damage claimants. Its advocacy seeks approximately $20,000,000 more for property damage claimants than the trustees concluded they should receive. The PD TAC's success in litigating that position would reduce funds available for asbestos disease claimants. The litigation expenses constitute direct property damage expenses and must be borne by the property damage claims fund. That allocation is consistent with the prevailing standard for handling legal fees in federal court. Unless authorized by

statute or contract or awarded as a sanction, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the losing litigant. Instead, each litigant bears its own legal expenses. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, et al., 421 U.S. 240, 247 (1975). Similarly, the litigation expenses of the Legal Representative seeking to lower the payment to the property damage claimants should be allocated to the asbestos disease fund. The Legal Representative agrees with that allocation.

Both New NGC and the Legal Representative contend that year 2002 expenses must be allocated since the SAV process has not yet been completed. As the plan provides, the trustees allocate expenses when actually paid. Consequently, expenses paid during 2002 before the completion of the SAV process must be allocated.

New NGC further contends that the trustees should establish a reserve for the property damage claims fund share of the fee-shifting expenses of the Prostok fraud litigation. National Gypsum Co. v. Prostok, et. al., civil action no. 3:98-CV-0869, Memorandum Opinion and Order, at 32 (N.D. Tex. 2000).

Dies testified that two of his clients, Birdville Independent School District and Tyler Junior College, intervened in the Prostok litigation to counter any assertion that the trust lacked standing to prosecute the subject claims. He sought to minimize the risk to his clients of any fee-shifting exposure. The trust

agreed to indemnify Birdville I.S.D. and Tyler Junior College for fee-shifting expense exposure. The trust thereafter established a trust reserve of $2,000,000 to cover fee-shifting expenses. In return, Birdville I.S.D. and Tyler Junior College transferred any amount they might recover in the litigation to the trust.

The Prostok causes of action are not valuation assets and, therefore, are not included in the SAV. Dies testified that his clients understood that any recovery would go to the trust for the benefit of the asbestos disease claims fund. Dies sought to protect his clients from incurring expenses as a result of the intervention. The trustees agreed that in exchange for assisting with the standing issue, Birdville I.S.D. and Tyler Junior College should have that protection.

The trust has paid no fee-shifting expenses to date. Consequently, under the plan, the trust has no expenses to allocate. Expenses paid after the completion of the SAV must be assessed against the asbestos disease claims fund. The trust has settled with several Prostok parties. The settlements include a waiver or release of fee-shifting obligations. Trust funds dedicated to the indemnification trust will be released to the trust should no fee-shifting expenses actually be assessed. Based on these circumstances, the trustees have not abused their discretion by deciding that Prostok fee-shifting expenses are too

remote and speculative to be allocated as part of the SAV process.

Dies further testified that, in the event of a recovery on the Prostok claims, his clients and other property damage claimants may move the court for an award of part of the recovery. Assuming that the court has the authority to grant such a request, Dies recognized that the court could, at that time, surcharge any recovery with any fee-shifting expenses owed or paid to any party in the case. Thus, if the trust recovered against one party but lost against other parties, the court could temper a distribution to property damage claimants with consideration of the fee-shifting expenses incurred.

New NGC further contends that the trustees have incorrectly allocated insurance interest expenses under Section XX of the Wellington Agreement. Three Wellington insurers, INA, Hartford and London, have asserted Section XX interest claims of $40,000,000. The trust and Asbestos Claims Management Corp. (ACMC) have settled these claims.[2] The trust has paid INA $186,000. According to Hilton, the trust owes INA an additional $22,000 as part of the settlement. ACMC and the trust have settled the London and Hartford insurance claims for $2,200,000.

[2]The trust owns the stock of ACMC. For most of this memorandum opinion, the court has not distinguished between the trust and ACMC. But, because of the Section XX dispute, the court recognizes the separate legal entities.

The trustees have allocated the Section XX expenses paid to date to the asbestos disease fund. Hilton testified that the proceeds of the Wellington insurance pay only asbestos disease claims and, therefore, the asbestos disease fund should bear the costs of the Section XX interest payments. But, New NGC observes that the Wellington insurance is included in the SAV. As the Section XX interest is a liability incurred by the trust after December 30, 1992, §5.1(l) of the plan requires that the trustees "take into consideration reductions in asset values" caused by the liabilities.

As the court understands the evidence, INA made the Wellington payments subject to Section XX before December 30, 1992. The INA insurance is, consequently, not part of the SAV calculation. The trustees, therefore, did not abuse their discretion in allocating the INA Section XX interest settlement payments to the asbestos disease fund.

Similarly, a portion of the London and Hartford payments had been tendered prior to December 30, 1992. But, the remainder had been paid after December 30, 1992, and that portion forms a part of the SAV. The Section XX obligation of ACMC and the trust reduces the value of the London and Hartford payments after December 30, 1992. Under the plan, the trustees must consider that reduction in value caused by the Section XX liability when determining the SAV.

To the extent that the Section XX settlement payment can be attributed to the payments from Hartford and London prior to December 30, 1992, the trustees would not abuse their discretion by allocating those payments, when made, to the asbestos disease fund. But, to the extent that the Section XX settlement payment can be attributed to the payments from Hartford and London after December 30, 1992, the liability for the settlement reduces the value of the payments received. As §5.1(l) mandates that the trustees take into consideration reductions in values caused by liabilities, the court concludes that the trustees have been directed by the plan to consider the Section XX settlement payment in the nature of an offset and reduce the SAV value accordingly. The trustees should pro rate the Section XX settlement amounts with the pre- and post-December 30, 1992, payments from London and Hartford. The resulting percentage for pre-December 30, 1992, payments should be allocated to the asbestos disease fund, when paid. The percentage for post-December 30, 1992, payments should be setoff against the SAV because that liability reduces the value of the asset.

Other Insurance Issues

New NGC next contends that the trustees did not follow the plan's procedure for valuing future potential recoveries from non-settling insurers. The trustees project that the trust will recover $39,500,000 from disputed insurance with a face coverage

of $75,500,000. The trustees have adopted this projection from an analysis by Hilton. New NGC argues that Hilton did not employ the method proscribed by Annex C at ¶¶4a and b.

Hilton testified that he based his projected settlements, in part, on the trust's actual experience resolving asbestos disease claims with and collecting settlements from various insurers. The trust has settled $245,000,000 of the original $320,500,000 of solvent disputed coverage insurers. Hilton testified that insurers have not defaulted in making prior settlements and that he fully expected outstanding settlements to be paid. In addition, the policies have been exhausted. Thus, Hilton opined that the issue is when carriers will make payments and in what amounts.

New NGC argues that the trust must employ the findings of the court's alternate facility decision. 257 B.R. at 199-200. The court agrees with the trust, however, that use of those findings would result in a windfall to the insurers. On the other hand, Hilton testified that insurers have not met his payment projection dates because of the trust's current inability to process claims.

Unlike New NGC, the Legal Representative expressed confidence in Hilton's knowledge of and analysis of the future potential recoveries from the non-settling insurers.

New NGC would have the court direct the trustees to employ insurance consultants to project future recoveries. The court finds that doing so would duplicate Hilton's expertise. In re National Gypsum Co., 243 B.R. 676, 681-82 (Bankr. N.D. Tex. 1999). The court further finds that the trustees reasonably employed the Annex C procedure in light of actual experience but without creating a windfall to the insurers.

Several insurers are insolvent. Transit Casualty accounts for half of the insolvencies. Transit has not timely made payments to the trust. Nevertheless, Hilton testified that the trust expected the payments to be made. In addition, Hilton testified that the insolvent carriers owe the trust about 40% more than the trust projected collecting. Again, the Legal Representative supported the trust's projections based on Hilton's expertise and experience. The trust reasonably projected recoveries from insolvent carriers.

However, the trust did err in accounting for CCR over-payments. Kahn testified that the CCR received funds from insurers as agent for and on ACMC's behalf. The trustees treated all payments made by insurers to the CCR on the date of receipt by CCR. Insurers erroneously made some payments to the CCR for ACMC. The CCR corrected those errors either by sending credit invoices to the insurers or sending cash to ACMC. New NGC and the Legal Representative demonstrated that the trust's method of

accounting and discounting the overpayments and corrections artificially inflated the value of the insurance. As the Legal Representative observes, the differential is not significant and, given the SAV range, may have no impact on the final payment to the property damage claimants. Nevertheless, in making the final calculation, the trustees need to correct the error.

Lastly, with regard to insurance issues, New NGC raised an issue regarding discounting proceeds of settlements from Home Insurance Company and Continental Insurance Company. As the trust received those proceeds prior to July 1, 1993, the plan effective date, the plan and trust agreement do not require a discount. The court refers the parties to its findings regarding the "as of" date for discounting found above.

Interim Payments

With the delay in making the SAV calculation, the trustees made three interim payments to the property damage claimants to cover the minimum base amount of $112,500,000, plus the Liberty Mutual payment and interest. The trustees paid $42,628,554 on July 25, 1996; $43,832,745 on July 25, 1997; and $45,000,475 on July 25, 1998. In 1996, the trustees first paid the Liberty Mutual payment of $5,000,000, then interest calculated by compounding annually, and then a portion of the $112,500,000 minimum base. In 1997, the trustees first paid the accrued interest on the remaining minimum base, and then a portion of the

base. In 1998, the trustees first paid the accrued interest on the remaining minimum base, and then paid in full the remainder of the minimum base. Consequently, as of July 25, 1998, the trustees had paid the minimum base of $112,500,000 and all accrued interest on that base amount. Actually, the trustees overpaid the interest to some degree because they compounded the interest.

The trustees attribute $5,000,000 for the Liberty Mutual payment. The parties agree with that determination. The Liberty Mutual payment has been made and does not constitute part of the instant SAV dispute.

In their request for authorization to make a final payment, the trustees have recharacterized the allocation of the interim payments between principal and interest. The court concludes that this recharacterization constitutes an abuse of discretion. Having paid the minimum base amount and the interest on that amount, the trustees would abuse their discretion by reversing those payments. It matters not whether the trustees labeled the three payments as interim or partial payments. Once a principal obligation and interest on that obligation has been paid, the trustees have no occasion or need to attempt to recharacterize the payments. The property damage claimants received payment of the minimum principal and the plan's requirement for the additional payment, the interest.

The property damage claimants are now entitled to the remaining payment determined by the SAV with interest on that amount from January 1, 1993.

The trustees must, therefore, calculate the final payment without recharacterizing the prior payments. The trustees should, however, offset any overpayment of interest caused by the compounding calculation used for the interim payments.

Conclusion

The parties have argued the effect of the SAV on funds available to pay asbestos disease claims. As the court has previously found, In re National Gypsum Co., 257 B.R. at 203, 204, asbestos disease claims in the future face the possibility of a payment of only 4.1-6.5% of the tort system value of their claims. On the other hand, given the amount of allowed property damage claims and the minimum distribution to property damage claimants, allowed property damage claims will receive about double the distribution contemplated at confirmation. New NGC and the Legal Representative contend that the court should assess the SAV to steer a greater amount of the remaining assets to the asbestos disease fund and away from the property damage fund.

The court has reviewed the issues irrespective of the outcome. The court will not engineer a pre-determined result. The compromise adopted in the plan must be applied on its own terms, with the court reviewing the trustees' determinations to

assure that the trustees have complied with the plan and applicable legal standards and that the trustees did not abuse their discretion.

The court has performed its function. The trustees must now make the final SAV calculation consistent with this memorandum opinion and order. The trustees shall file a final calculation with an amended motion requesting court authority to make a final payment to property damage claimants based on that calculation. The trust shall submit a proposed order with the amended motion. The parties in interest shall have twenty days to respond in writing to the amended motion. The court may enter a final order without a further hearing.

SO ORDERED.

Signed this _____ day of April, 2002.

_____
Steven A. Felsenthal
United States Bankruptcy Judge